tributory negligence, and that the negligence of the father or mother, or of both of them, can not be imputed to it.

2nd. That if the defendant railroad company may reasonably have expected that persons habitually using its track where the accident occurred might be upon such track, then it owed the duty of taking reasonable care to discover and not to injure any such person (this is substantially covered by the first headnote); and if the jury believed from the evidence in the case that the engineer could, by the exercising of reasonable care under the circumstances, have discovered the danger of the infant plaintiff in time to have avoided injuring him, but failed to exercise such care, by reason of which the infant plaintiff was injured, the defendant company is liable.

The court also passes upon an instruction based upon the fact that the track at the point of the accident was not used as a walk and passway with defendant's knowledge. This instruction said that if the engineer of the defendant in charge of its engine at the time of the injury discovered the infant plaintiff on the track in front of the engine in time to have stopped the engine and avoided the injury, but that after such discovery, he negligently and carelessly failed to take any precaution to stop the engine but ran the same over him, then the defendant is liable, and the court approved this instruction as a proposition of law, and also holds that there was evidence to support it.

We also think that this case is authority for the proposition that where a witness testifies to a fact, although there is no opposing testimony, yet, where such testimony can not in the nature of things be true, the jury are entitled to discredit it, and to give their verdict for the opposite side. See also, annotation to case of Chesapeake, etc., Ry. Co. *v.* Corbin, 67 S. E. 179, 16 Va. Law Register 184, 189.

J. F. M.

ATLAS PORTLAND CEMENT CO. *et al. v.* MAIN LINE REALTY CORPORATION *et al.*

March 9, 1911.

[70 S. E. 536.]

1. Mechanics' Liens (§ 192*)—Estate or Interest Affected—Lien on Reversion of Landlord for Improvement by Tenant.—A corporation owning land leased it to another corporation which agreed to erect a building thereon at its own expense, and, on failure of the lessee to keep the covenants of the lease, the lot and improvements to revert to the lessor, and the lessee took possession and contracted for the erection of the building, but failed to complete it, and the lot, with the uncompleted building, on which mechanics' liens had been perfected, reverted to the lessor. Code 1904, § 2475, gives a mechanic's lien on a building and so much of the land therewith as shall be necessary to the convenient use of the premises; and section 2483 provides that, where any person causing a building to be erected owns less than a fee-simple estate in the land, then only

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

his interest therein shall be subject to such liens. Held that, unless the lessor caused the building to be begun, its interest in the lot was not subject to the liens.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 334; Dec. Dig. § 192.*]

2. Mechanics' Liens (§ 72*)—Agreement or Consent of Owner—Authority to Agree—Tenants.—Where a lessee is required by the lease to erect a building upon the land, it does not thereby become the agent of the lessor, with implied authority to create a lien on the lessor's interest for the improvements.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 86; Dec. Dig. § 72.*]

3. Mechanics' Liens (§ 58*)—Consent of Owner—Notice to Prevent Lien—Record of Lease.—Where a lease requiring a building to be erected on the land by the lessee at its own expense is put upon record, such lease is notice of its contents to parties furnishing labor and materials to lessee in the erection of the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 72, 73; Dec. Dig. § 58.*]

4. Mechanics' Liens (§ 75*)—Agreement or Consent of Owner—Improvement by Lessee—Statutes—"Cause."—The lessee of land agreed by the terms of the lease to erect a building thereon, and took possession and made contracts with general contractors for its erection, under which the work was done. The lessor in no way contracted with the general contractor, or authorized the furnishing of material, and the work was not done at its expense or request, and when the building was partly completed the land and improvements reverted to the lessor. Code 1904, § 2483 provides that, if any person who shall "cause" a building to be erected owns less than a fee-simple estate in the land, then only his interest therein shall be subject to mechanics' liens. Held, that the lessor did not "cause" it to be erected.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 105; Dec. Dig. § 75.*

For other definitions, see Words and Phrases, vol. 2, pp. 1009-1012; vol. 8, pp. 7597, 7958.]

Appeal from Law and Chancery Court of City of Norfolk.

Action by the Atlas Portland Cement Company and others against the Main Line Realty Corporation and others. Judgments for defendants, and plaintiffs appeal. Affirmed.

Thos. W. Shelton, Leo Judson, Jno. B. Jenkins, Jeffries, Wolcott & Lankford, and *Loyall, Taylor & White,* for appellants.

Floyd Hughes, Williams & Tunstall, H. H. Little, and *Ro. W. Shultice,* for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

BUCHANNAN, J. On the 1st day of January, 1907, the Richmond Company and Main Line Realty Corporation, both incorporated under the laws of this state, entered into a contract by which the former leased to the latter a lot of land situated on Granby street, in the city of Norfolk, to hold from that date for the period of 20 years, for an annual rent, payable monthly, of $12,500, and the lessee agreed to erect and maintain at its own expense a building on the said lot at least two stories high, built of brick or stone, to cost when complete not less than $125,000 (afterwards changed to $90,000), the building to be commenced on or before the 10th of February following, and completed with all reasonable diligence and dispatch. The agreement further provided for keeping the property insured, and the payment of taxes, etc., by the lessee, and that if the lessee or its assigns or successors should at any time during the said term fail to keep the covenants of the lease on its part for a certain period designated therein, the lessor, its successors or assigns, etc., had the right to enter upon the said premises and the improvement thereon or to be erected thereon; and the same to have again, repossess, and enjoy absolutely and in fee simple, as though the said lease had never been made, and without making any compensation to said lessee, its successors or assigns, for the said building. The lease further provided that at the expiration of the 20 years the deed of lease should be taken and deemed to be in full force for the period of 20 years, at the same annual rent, and in all other respects upon the same terms and conditions, and so on forever. There were other provisions in the lease, but they are not material to the decision of this appeal.

Under this agreement, which was recorded in the proper office, the lessee took possession of the lot and entered into a contract with E. Tatterson, a general contractor, to construct the building mentioned in the lease, except certain minor parts of the work, which were undertaken by two other independent contractors. Tatterson proceeded to carry out his contract, did considerable work, and furnished a good deal of material in performing his agreement, until the lessee, in the early part of the summer of the year 1907, being unable to meet its obligations and make payments to Tatterson, he discontinued work on the building, and the building was not completed. Thereupon numerous persons perfected their liens for labor and supplies. They afterwards became parties to this suit, and the questions we are called upon to determine on this appeal is whether or not they or any of them have liens upon the lessor's interest in the lot which reverted to him from the lessee's failure to keep and perform its covenants in the lease.

By section 2475 of the Code of 1904 it is provided: "All arti-

sans, builders, mechanics, lumber dealers, and other persons performing labor about or furnishing materials for the construction, repair, or improvement of any building or structure permanently annexed to the freehold, and all persons performing any labor or furnishing materials for the construction of any railroad, whether they be general or subcontractors or laborers, shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment of the premises, and upon such railroad and franchise for the work done and materials furnished; but where the claim is for repairs only no lien shall attach to the property repaired unless the said repairs were ordered by the owner or his agent."

Section 2483 provides that, "if any person who shall cause such building or structure to be erected or repaired owns less than a fee-simple estate in such land, then only his interest therein shall be subject to such liens."

When the provisions quoted are read together (whatever might be the proper construction of section 2475 if our statutes on the subject of mechanics', etc., liens did not contain the provision quoted from section 2483), it is clear, we think, that the interest of the lessor in the lot cannot be subjected to the liens of the appellants, unless the lessor caused the building to be erected on the lot.

There was an effort made in the trial court, as stated in the report of the commissioner, to whom was referred the question of ascertaining the amount of the debts of the appellants and the property upon which they were liens, "to show that there was fraud and deception practiced upon the subcontractors by certain persons who were officers and stockholders of these two companies (the lessor and lessee corporations), but the testimony utterly fails to establish those charges. The Main Line Realty Corporation had its origin at a time when many persons who were usually conservative believed that there was almost unlimited profit in an investment on Granby street, and this, like many other undertakings at that time, proved to be a failure."

Without discussing the evidence upon this question, it is sufficient to say that we agree with the commissioner that no such fraud was proved. Indeed, as we understand appellants' counsel in their oral argument in this court, that contention was abandoned.

It is insisted that the appellants' claims are liens upon the lessor corporation's interest in the lot, because the lessee corporation was in effect the agent of the lessor in causing the building to be erected on the lot. The evidence fails to sustain this contention, unless in a contract of lease, where the lessee is by its terms re-

quired to erect a building upon the leased premises, the lessee becomes the agent of the lessor.

It is well settled that such relation does not make the tenant the agent of the landlord, and that it does not give him the implied authority to create a lien upon the landlord's interest therein for improvements made thereon, unless the lawmaking power expressly or by necessary implication enacts otherwise. Phillips on Mechanics' Liens, §§ 89, 90; Boisot on Mechanics' Liens, §§ 289, 291; Jones on Liens, §§ 1273, 1276; Mills *v.* Matthews, 7 Md. 315; Rothe *v.* Bellingrath, 71 Atl. 55; Harman *v.* Allen, 11 Ga. 45.

It is further insisted that the lessor caused the building to be erected on the leased premises within the meaning of section 2483 of the Code.

That section, as before stated, provids that, "if the person who shall cause such building or structure to be erected or repaired owns less than a fee-simple estate in such land, then only his interest therein shall be subject to such liens.

It is true, as argued, that the contract of lease required the building to be erected; but it was to be erected by the lessee, and the lessee alone, and at its cost. The lease was of record, and the appellants must be charged with notice of its contents. The lessor in no way, directly or indirectly, contracted with the general contractor or the persons who did the labor or furnished the supplies. On the contrary, the agreements for its erection were between the general contractors and the lessee. Under these contracts, the work was done and the supplies furnished. The lessor was no party to those contracts, and the work was not done nor the supplies furnished at its instance or request. We do not think that, in any proper sense of the word "cause," as used in the statute, it can be held that the lessor caused the building to be erected.

In the case of Cornell *v.* Barney, 94 N. Y. 394, in construing the word "cause" in a mechanic's lien statute which is similar to our own on this point, the Court of Appeals of New York said: "The plaintiffs can have no lien under this section upon Barney's (the landlord's) interest in the land, because he did not in any proper sense cause the building to be constructed. Within the meaning of this section, the building must be constructed for and at the expense of the landlord, or under contract with him. Salem (the tenant) caused the building to be constructed, and the plaintiffs could have no lien upon his interest in the land under the lease."

In that case the materials were furnished by the plaintiffs under a contract with a lessee, for a building in process of erection by the latter, in pursuance of provisions in his lease by which he covenanted to erect a building on the leased premises of at least a

specified value. The lessor covenanted to loan a named sum as the building advanced, to be secured by mortgage on the lessee's interest. The building, at the end of the last of certain renewals provided for in the lease, or sooner, in case the lessee failed to perform his covenants, was to revert to and become the property of the lessor. In an action to foreclose an alleged mechanic's lien, it was held that, in the absence of evidence that the lessor had some connection with the plaintiff's contract, the plaintiff was not entitled to have or enforce a lien against the interest of the lessor in the land or building, but only against that of the lessee. See, also, Jones on Liens, §§ 1273, 1275; Boisot on Mechanics' Liens, § 296; Phillips on Mechanics' Liens, §§ 27, 88.

The trial court having held, in accordance with the views expressed in this opinion that the appellants' claims were not liens upon the interest of the lessor in the leased premises, it follows that its decree must be affirmed.

Affirmed.

Note.

This is an interesting case and one of first impression in this state on the construction of the mechanic's lien statute as to the effect of a mechanic's lien growing out of a contract with a lessee upon the interest of the lessor, where the lease required the lessee to erect the building and the premises had reverted to the lessor by reason of a breach of such covenant. The decision seems to be clearly right, and it is hard to see how the court could have decided otherwise in view of the language of our statute, and the cases cited and the opinions of text-writers upon the proper construction of similar statutes in other states. A West Virginia case which tends to support the holding here, is that of Charleston, etc., Lumber Co. *v.* Brockmyer, 18 W. Va. 586. That case, while holding that the equitable owner could incur a mechanic's lien upon his interest, held that the lien would of course be confined to a lien on his interest in the land, which in this case was that of a vendee under contract of purchase. The case went on to hold that the mere consent of the holder of the legal title that his vendee shall or should erect a building upon the land (which would seem analogous to the requirement of the lessor here that such a building should be erected) would not make the interest of the legal owner of the land liable to a mechanic's lien arising from the contract by the mechanic with the party who had agreed to purchase the land. Of course a mechanic's lien is a creature of statute, and must have its foundation in a contract with which is must correspond. Sergeant *v.* Denby, 87 Va. 206, 12 S. E. 402.

It has been generally held that the word "interest," as defining what shall be subject to the lien, includes a leasehold interest and any structure that becomes a part of such estate or interest. It would seem a necessary corollary from this that where such "interest" is only that of a lessee, then only that is subject to the lien. See Showalter *v.* Lowndes, 56 W. Va. 462, 49 S. E. 448. Three exhaustive and luminous articles upon the subject of mechanics' liens in Virginia have already appeared in this magazine, one, by N. C. Manson, Jr., in II Virginia Law Register 489, another in IX Vir-

ginia Law Register 369, by John Garland Pollard, and the third, by Thos. W. Shilton, in XV Virginia Law Register 1, on the construction of § 2479.

We will close by referring to the case of Pace *v.* Moorman, 99 Va. 246, 37 S. E. 911, reported, with a valuable note, in 6 Virginia Law Register 829, 836, also construing § 2483. The majority opinion held that, where A holds title to real estate by an unrecorded conveyance, and B takes out a mechanic's lien on the property under contract with A, and C then recovers and dockets a judgment against A's grantor, then B's lien, claimed through A, takes priority over the judgment lien. This is based upon the construction of another sentence of this statute, but the minority of two judges (Phlegar and Buchanan) laid stress upon the sentence under consideration in the principal case, and expressed the opinion that the intention was that the mechanic's lien should bind no greater interest than the party contracting with the mechanic has in the property—that the mechanic being in privity with him, claiming through him, should stand or fall on his title. This is the basis of the decision in the principal case, as no question of a conflict of lien arises here.

J. F. M.